

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO



IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: CA&R 1/2022

In the matter between:

HENDRIK KAMMIES

Appellant

and

THE STATE

Coram: Lever J et Nxumalo J

JUDGMENT

Lever J

1. The appellant was accused 2 in the court *a quo*. The appellant together with his co-accused, faced 3 charges in the court *a quo*. The first charge was one of kidnapping. Where both accused were alleged to have taken the victim from outside a shebeen to a shack some distance away where

the crime which is the subject of the second charge was committed. The second charge was one of rape, where both accused allegedly raped the victim. Relevant to the current appeal, the charge made specific reference to the Criminal Law Amendment Act¹ (the minimum sentence act) and more particularly section 51 thereof, as read with schedule 2 thereof. The third charge was one of malicious damage to property. This charge relates to the burning of certain articles of clothing belonging to the victim.

2. The appellant and his co-accused were found guilty on all three of the above charges. On the charge of kidnapping, the appellant was sentenced to 3 years in imprisonment. On the charge of rape, the appellant was sentenced to life imprisonment. On the charge of malicious damage to property, the appellant was sentenced to 2 years imprisonment. The sentences in respect of the first and third charges were ordered to run concurrently with the life sentence. The appellant's co-perpetrator was given the same sentences.
3. The appellant does not appeal his convictions and only appeals against the sentences imposed. In substance, the appellant only appeals the life sentence imposed on him in respect of the conviction of rape.

¹ Act 105 of 1997.

4. It was common cause between the appellant and the State that section 51(1), as read with Schedule 2 Part I, under the sentencing provisions for 'rape' item (a)(ii) of the said minimum sentencing act applied.
5. The consequence of this is that the minimum prescribed sentence for rape under those circumstances is life imprisonment. In order for the court *a quo* to depart from this prescribed minimum sentence, such court would have needed to find 'substantial and compelling' reasons to impose a lesser sentence, as contemplated in section 51(3) of the said minimum sentencing act.
6. It is further common cause that the learned trial Magistrate in the court *a quo* found that there were no substantial and compelling reasons to depart from the prescribed minimum sentence and in fact imposed the prescribed minimum sentence of life imprisonment on the appellant. This is in fact the substance of the appeal in this matter.
7. Further, there is an application for condonation in relation to the late filing of the Notice of Appeal. Originally, the appellant filed a notice of appeal against both the convictions and the imposition of the life sentence. However, the appellant only proceeded with the appeal on sentence.
8. The State does not oppose the application for condonation.

9. The appellant personally drafted and filed a Notice of Appeal in circumstances where his family had assured him that they would acquire the services of a private attorney. However, the family was unable to secure the funds in order to appoint a private attorney. The Notice of Appeal was personally drafted and filed by the appellant approximately seven months out of time when he realised that he had no lawyer. In these circumstances, it cannot be said that the appellant was negligent. The delay was not unreasonable in the circumstances. The issue is undeniably important to the appellant. While the prospects of success are not very strong, there is at least an arguable case.

10. Weighing up all of these interrelated considerations condonation for the late filing of the Notice of Appeal was granted at the hearing of this appeal.

11. Mr Steynberg submitted that in an appeal where the minimum sentencing act applied, the approach on appeal is different from the normal approach to sentence on appeal. Where the minimum sentence act applied, the court of appeal has to look at the facts placed before the court *a quo* and decide whether they are 'substantial and compelling' or not. In support of this contention, Mr Steynberg relied on the case of *S v PB*.²

²² *S v PB* 2013 SACR 533 (SCA) at para [20].

12. Mr Steynberg then referred to the 'determinative test' as it was framed by the Supreme Court of Appeal in the case of *S v MALGAS*³. The determinative test is a central part of the argument pursued by Mr Steynberg on behalf of the appellant.
13. Mr Steynberg then referred to the Constitutional Court decision in the matter of *S v DODO*⁴ and contended that the learned trial Magistrate in the court *a quo* did not even enquire into the proportionality of the life sentence of the appellant in the circumstances of his case, which he submitted constitutes a misdirection.
14. What Mr Steynberg loses sight of in pursuing this argument is that the appellant and his co-perpetrator acted in concert and with a common intention and purpose to rape the victim. These facts emerge clearly from the record and cannot be gainsaid. This fundamentally alters the power relationship between the perpetrators and the victim. This in and of itself is an aggravating factor. The legislature has clearly treated this as an aggravating factor by providing that when two or more co-perpetrators act with common intent and common purpose in committing a rape, that in itself is worthy of a life sentence. In these circumstances, Mr Steynberg's argument that this constitutes a misdirection by the learned trial Magistrate cannot be upheld.

³ 2001 (1) SACR 469 (SCA) at para [25].

⁴ 2001 (1) SACR 549 (CC) at para [38].

15. The appellant's personal circumstances are listed as: He is 31 years old; he is unmarried with one minor child; he earned R1500 every fortnight; he used this income to take care of himself and his child; the minor child stays with her mother who is unemployed; he only completed standard 2 at school; he has 4 previous convictions; and he spent 15 months in jail whilst the trial ran.
16. Mr Steynberg correctly conceded that where a long custodial sentence is called for, these factors as raised by the appellant recede into the background.
17. Mr Steynberg then submitted that the learned trial Magistrate erred in treating the appellant and his co-perpetrator the same when it came to sentencing. He pointed out that the co-perpetrator had 25 previous convictions and the appellant only had 4 previous convictions.
18. From the record, it is evident that the learned trial Magistrate had both relevant SAP 69's placed before her. It is also evident that she considered the nature of the previous crimes and the sentences imposed in respect of the appellant and the co-perpetrator. The record also shows that in respect of the appellant and the co-perpetrator, each had one previous conviction for assault GBH, which was particularly relevant in the case before her. In my view, the learned trial magistrate did not err in this regard. This is especially so in the light of the fact that there is a minimum prescribed sentence. Accordingly, at best the differences in

previous convictions might form a partial basis for a substantial and compelling reason not to apply the minimum prescribed sentence and impose a lesser sentence. However, in no sense of the word can it be said that the learned trial Magistrate erred in this regard. In my view it does not constitute even a partial basis to find a substantial and compelling reason not to apply the prescribed minimum sentence.

19. Mr Steynberg then turns to the case of *S v SMM*⁵ which found in essence that a court can consider a lack of serious or lasting injury, cumulatively together with other factors as a basis for 'substantial and compelling' reason not to impose the legislated and prescribed minimum sentence.

20. Mr Steynberg then submits that the fact that the victim suffered no serious or lasting injury, taken together with the fact that the appellant has the potential to be rehabilitated by a long term of imprisonment and the personal circumstances taken cumulatively does constitute a substantial and compelling reason not to impose the prescribed minimum sentence.

21. The manner in which Mr Steynberg has raised the potential of the appellant to be rehabilitated by a long custodial sentence is nothing more than the speculative hypothesis warned against by the SCA in the *Malgas* case⁶. The appellant has from the record shown no remorse for

⁵ 2013 (2) SACR 292 (SCA) at 302c – g.

⁶ *S v MALGAS* 2001 (1) SACR 469 (SCA) at 477d.

his violation of the victim. The appellant has shown no empathy for his victim. The appellant has shown no understanding of how this violation would inevitably have affected his victim. In these circumstances, I cannot support Mr Steynberg's argument.

22. Accordingly, I cannot find that the learned trial Magistrate erred in not finding substantial and compelling reasons to apply a lesser sentence. Also, from the record, I cannot find that any substantial and compelling reason exists to impose a lesser sentence. In these circumstances, the appeal stands to be dismissed.

The following Order is made:

1) The appeal is dismissed.



Lawrence Lever
Judge
Northern Cape Division, Kimberley.

I agree,



APS Nxumalo
Judge
Northern Cape Division, Kimberley.

REPRESENTATION:

Appellant: Mr Steynberg oio LEGAL AID SOUTH AFRICA,
KIMBERLEY

Respondent: Adv Molefe oio OFFICE OF DIRECTOR OF PUBLIC
PROSECUTIONS

Date of Hearing: 28 November 2022

Date of Judgment: 26 January 2024